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In The
Supreme Court of the United States

ANATOLY SVERDLIN, INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF AUTOMATED MARINE PROPULSION SYSTEMS, INC.,

Petitioner,

V.

MARK SWANK, MARVIN CHUDNOFF, JEFFREY SUSSMAN, LOUIS DREYFUS NATURAL GAS HOLDINGS CORP., L.D.E. ASSOCIATES, L.L.C., AND JAMES MCCOY, JR.,

Respondents.

On Petition For Writ Of Certiorari To The First Court of Appeals, Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Amendment to the United States Constitution guarantees a right to a civil trial by jury. Under the Seventh Amendment, the right to a civil trial by jury must be preserved and "no fact tried by the jury, shall otherwise by reexamined in any Court of the United States,. . . ." Texas appellate courts, in judicially erasing and reexamining facts tried by the jury, are arbitrarily and capriciously denying Texas citizens this fundamental common-law right. Should the Seventh Amendment right to a jury trial in civil cases be extended to the states through the Due Process Clause of the Fourteenth Amendment?

Can Texas courts judicially erase and reject the facts tried by the jury without arbitrarily and capriciously denying Texas citizens of the Seventh Amendment right to trial by jury?

LIST OF PARTIES

Petitioners are Anatoly Sverdlin, Individually and Derivatively on Behalf of Automated Marine Propulsion Systems, Inc.

Respondents are Mark Swank, Marvin Chudnoff, Jeffrey Sussman, Louis Dreyfus Natural Gas Holdings Corp., L.D.E. Associates, L.L.C., and James McCoy, Jr.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Anatoly Sverdlin and Automated Marine Propulsion Systems, Inc. state that Automated Marine Propulsion Systems, Inc. was a privately held Texas corporation. None of its shares is held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Anatoly Sverdlin, Individually and Derivatively on Behalf of Automated Marine Propulsion Systems, Inc., respectfully files this petition for a writ of certiorari to review the judgment of the Court of Appeals for the First District in Houston, Texas.

Sverdlin risked his life to escape the Soviet Union and come to the United States to live out the American dream. His life's work culminated in the invention of fuel-injection technology that would allow shipping vessels to run cleaner and more efficiently. The patents on this technology were swindled from him by the respondents. In his suit against the respondents, the jury awarded $1.5 billion dollars in damages. Through remititur, the trial court reduced the jury award by 88% to $180 million. After scant and erroneous analysis, the appellate court calls 30 witnesses and 185 exhibits "no evidence" on eight different causes of action against six parties and, after rejecting the facts found by the jury, renders a take nothing verdict for Sverdlin and his company.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court denied discretionary review in this case (App. E, *infra*) and its order is unpublished. The opinion of the Court of Appeals for the First Judicial District (App. A) is reported at 121 S.W.3d 785. The Judgment of the 215th Judicial District Court, Houston, Harris County, Texas is unpublished (App. B, *infra*).

JURISDICTION

The Texas Supreme Court denied discretionary review in this case. The Judgment of the Court of Appeals for the First Judicial District in Houston, Texas is that of the highest court possessing and exercising jurisdiction. (App. A, *infra*). This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Seventh Amendment and Fourteenth Amendment to the United States Constitution are set forth below:

The Seventh Amendment provides: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Fourteenth Amendment provides, in relevant part: "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an appeal from a six-week jury trial of a complex commercial dispute. Anatoly Sverdlin sued the respondents individually and on behalf of the company

AMPS in his derivative capacity seeking declaratory relief and alleging numerous causes of action, including fraud, breach of contract, breach of fiduciary duty, negligence, gross negligence, conspiracy, tortious interference, and usury. (App. B, *infra*.)

The jury answered all of the questions in favor of Sverdlin and AMPS. (App. B, *infra*). The jury's findings are based on six weeks of trial, four weeks of testimony which included 30 witnesses and 185 exhibits. After several post-verdict hearings, the trial judge entered a final judgment for approximately $235 million in damages, and declared Sverdlin owner of 100% of AMPS's stock. Later, a second trial judge remitted a portion of the punitive damages, further reducing the judgment to approximately $180 million. (App. B, *infra*.)

On September 4, 2003, the Court of Appeals for the First Judicial District in Houston, Texas reversed the judgment of the trial court and rendered judgment that Petitioners take nothing. *See Swank v. Sverdlin*, 121 S.W.3d 785, (Tex. App. – Houston [1st Dist.] 2003, pet. denied). The court of appeals findings are as follows:

(1) Usury – in spite of unobjected to expert testimony, the appellate court found the jury had no evidentiary basis on which to base its valuation of the patent assignment;

(2) Breach of Fiduciary Duty – the jury at trial was presented with evidence that Sverdlin's company was worth $26.9 million in June of 1996 and insolvent at the time of trial. The appellate court found no evidence exists in the record to support a finding that three director-respondents each caused $5 million in damages for their alleged breaches of fiduciary duty;

(3) Tortious Interference – the jury heard testimony from two former employees of AMPS that directly supported the tortious interference cause of action. The appellate court found no evidence exists in the record to prove that respondents committed an act that constituted tortious interference;

(4) Fraud – documents prepared by respondent authored both the value of Sverdlin's company and his patents. The jury was presented with evidence that the licensing rights to the patents had been contracted out for five years at $90 million. The appellate court found no evidence exists in the record to support an award of damages for fraud;

(5) Negligent Misrepresentation – the appellate court found the trial court did not err in disregarding the jury's finding of negligent misrepresentation.

On October 15, 2004, the Supreme Court of Texas denied discretionary review in an unpublished order without issuing an opinion. (App. D, *infra*). On December 10, 2004, the Supreme Court of Texas denied rehearing of the petition for review in an unpublished order without issuing an opinion. (App. E, *infra*).

REASONS FOR GRANTING THE PETITION

The decision of the appellate court below judicially eviscerates an important and valuable fundamental, constitutional right and is exemplary of the type of judicial activism that is occurring in Texas appellate courts. The case raises issues of critical significance regarding the application and scope of the Seventh Amendment right to

trial by jury. It has become a routine practice in Texas appellate courts to judicially erase the facts found by juries in civil cases, reducing the essential Seventh Amendment guarantees to mere rhetoric. In addressing the constitutionality of federal civil procedures that appear to blatantly reexamine jury verdicts in violation of the Seventh Amendment, Justices of this Court have denounced the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *See Galloway v. U.S.*, 319 U.S. 372, 397 (1943) (Black, J., dissenting); *see also Tull v. U. S.*, 481 U.S. 412, 428 (1987) (Scalia, J., dissenting); *Colgrove v. Battin*, 413 U.S. 149, 166 (1973) (Marshall, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-39 (1979) (Rehnquist, J., dissenting).

A citizen's right to seek redress from those who have damaged him and recover the fair value of what has been lost is a basic principle of our system of jurisprudence. Americans also have the corresponding right for a jury of their fellow citizens to make the determination of that fair value. Only this Court through indoctrination of the Seventh Amendment and discretionary review can restore and protect this fundamental principle of our system of liberty and justice.

A. Judicial Activism in Texas appellate courts have rendered the Seventh Amendment right to a civil jury trial a nullity.

Texas appellate courts, under the guise of legal sufficiency review, are routinely rejecting and reexamining facts tried by the jury depriving verdict winners of the minimum guarantees of the Seventh Amendment. A sampling of appellate opinions for the years 2002, 2003

and 2004 reveals that when a judgment was entered on a jury verdict, the most common reason for reversal was that the evidence was legally insufficient or one of the parties was otherwise entitled to judgment as a matter of law. This category of reversals consistently accounted for up to 60% of the reversals. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 435 (2003). A similar sampling of cases in 1990 revealed only an approximate reversal rate of 29% based on legal sufficiency.

Texas appellate courts are declaring the evidence "legally" insufficient when in reality the appellate court is otherwise reexamining the facts tried by the jury and substituting its mind for that of the jury's. The second clause of the Seventh Amendment states, "[N]o fact tried by a jury, shall be otherwise examined in any Court of the United States. . . ." The Fourteenth Amendment was passed to ensure that due process exists to protect all Americans from such judicial activism. The decision of the appellate court is yet one more glaring example of the judicial activism occurring in Texas courts that must be rectified.

B. Due Process requires that the Seventh Amendment be binding on the States.

The right to trial by jury in civil cases is among those fundamental principles of liberty and justice guaranteed to every American in the Bill of Rights which lie at the base of all American civil and political institutions that is basic in this country's system of jurisprudence and essential to a fair trial. The Seventh Amendment is a fundamental constitutional right of value and importance to every

American that should be held to bind the states and the federal government. The Fourteenth Amendment provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

Sverdlin respectfully submits that due process requires that the Seventh Amendment right to a jury trial in civil cases be applied to the states to prevent state judiciaries from abridging this fundamental right.

This Court's doctrine of incorporation provides that the personal rights contained in the first eight amendments of the Bill of Rights can be applicable to the states in addition to the federal government. *See Dickerson v. United States*, 530 U.S. 428, 433 (2000). This doctrine is premised on the notion that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *See Mapp v. Ohio*, 367 U.S. 643, 647 (1961). It gives life to "Madison's prediction that independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." *Id.* Applying this Court's test for incorporation, there can be no denying that the Seventh Amendment should be held to bind the states in civil matters to no lesser degree than the Sixth Amendment governing criminal matters.

In *Duncan v. Louisiana*, this Court addressed whether the Sixth Amendment right to a trial by jury applied to the states as well as the federal government. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). The Duncan Court developed a test to determine whether the right to a jury trial in criminal cases was fundamental and necessary to an Anglo-American regime of ordered liberty. The Court first looked to English law to determine if the right was firmly established at the "time our Constitution was written." *Duncan*, 391 U.S. at 151. Beginning with the Magna Carta and the English Bill of Rights of 1689, the Court found forms of the right to a criminal jury trial. *Id.* After reviewing American manifestations of the English tradition, the remedial documents – article III, section 2 of the Constitution and the Sixth Amendment, and state constitutions, this Court concluded that "[e]ven such a skeletal history [wa]s impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in opinions of this Court." *Id.* The right to trial by jury in the civil cases is no less consistent with the American system of justice and liberty.

The Court in *Duncan* established three inquiries under the incorporation doctrine, which ask if the constitutional right involved is: (1) "of such a character that it c[ould] not be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions;" (2) "basic in our system of jurisprudence;" and (3) "essential to a fair trial." *Duncan*, 391 U.S. at 151. The Seventh Amendment right to a trial by jury meets each of the *Duncan* criteria for incorporation.

1. The right to trial by jury is a fundamental right of such a character that it could not be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

The right to a civil jury trial, as it existed at English and American common law, cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all American civil and political institutions. History shows that the civil jury trial was long guaranteed under English law and was even more jealously defended by the colonies. Alexander Hamilton wrote that the lack of a civil jury guarantee was probably the most successful argument against the adoption of the Constitution. The Federalist No. 83 (Alexander Hamilton) ("The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the WANT OF A CONSTITUTIONAL PROVISION FOR THE TRIAL BY JURY IN CIVIL CASES.") (emphasis added). James Madison, though agreeing with the "sacred" nature of trial by jury, initially opposed the addition of a guarantee in the Constitution principally on the grounds that too much variation in American practice had occurred among states since the nation's independence and that the states should determine to what extent the right was guaranteed. Madison, *Speech in the Virginia Ratifying Convention on the Judicial Power, in Writings* 399 (Jack N. Rakove ed., 1984). Ultimately, Madison changed his mind and promised the introduction of the Bill of Rights after the Constitution was ratified:

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants. . . . Madison, Letter to George Eve Jan. 2nd 1789, in Writings at 428.

Madison, true to his word, addressed Congress on August 15, 1789 and stated that he approved of the amendments. Madison, Remarks in Congress on Proposed Constitutional Amendments, in Writings at 470. The amendments were ratified and took effect in 1791. Several of the states included express statements concerning civil jury trials in their ratifications. North Carolina, for example, stated: "Resolved. . . . That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable." Ratification of the Constitution by the State of North Carolina § 11 (Nov. 21, 1789); accord Ratification of the Constitution by the State of Virginia (June 28, 1788).

Contemporaneous with the Seventh Amendment, the Judiciary Act of 1789 was introduced, which also provided jury trials for legal causes of action. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830). Of the seven states that ratified the Constitution and also proposed amendments, six included proposals for the preservation of jury trials in civil cases. *Galloway v. United States*, 319 U.S. 372, 398 n.3 (1943) (Black, J., dissenting).

On March 4, 1801, Jefferson emphasized the extent to which a civil jury trial was a fundamental principle of this

nation in his first inaugural address, "[I]t is proper you should understand what I deem the essential principles of our Government, and consequently those that ought to shape its Administration. . . ." Jefferson, First Inaugural Address, March 4, 1801, in Writings at 494. Jefferson ended the list of principles with "trial by juries impartially selected." *Id.* at 495 (emphasis added). In his discussion of the essential principles of government, Thomas Jefferson proclaimed:

> These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

Id. To deny citizens the right to a trial by jury in civil cases by definition violates the base of American civil and political institutions.

Texas has, historically, strongly protected its citizen's rights to a jury trial in civil cases and has actually incorporated the Seventh Amendment in its own constitution. The right to a jury trial reserved to the people in under article V, section 10 of the Texas Constitution is significantly broader than that granted in the Seventh Amendment of the United States Constitution, and includes actions both legal and equitable in nature. *Trapnell v.*

Sysco Food Servs., Inc., 850 S.W.2d 529, 544 (Tex. App. – Corpus Christi 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994).

The language and historical context of the Texas Constitution is unequivocal. Yet, despite the state founders' clear desire to protect the citizens of Texas from infringement of their right to a trial by jury and access to the state's courts, to incorporate and broaden the Seventh Amendment, the recent decisions of the Texas Judiciary overtly abrogate both the letter and spirit of the Texas Constitution and the United States Constitution, ignoring the express intent of the founders of the state and of this country.

An attack on the fundamental right of trial by jury by a state judiciary, purportedly in the name of legal sufficiency review, implicates serious due process concerns. This Court should recognize the civil jury's place among the fundamental principles of liberty and justice.

2. The right to trial by jury is a fundamental right that is basic to our country's systems of justice.

The right to trial by jury in civil cases is basic to our system of jurisprudence. The right to a civil jury trial is without question among the most essential and basic in this country's democratic system of jurisprudence. The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to Americans should be jealously guarded by the courts not ignored or displaced on appeal. *See Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942). As a democratic nation, the jury preserves governance by the people, acting as a safeguard for Americans

against unchecked state power. Thomas Jefferson said, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 344 n.10 (1979) (Rehnquist, J., dissenting) (quoting 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861)). The right to trial by jury is at the core of the system of American jurisprudence and preserves and promotes democracy. Justice Rehnquist recognized this inherent and basic quality of our jurisprudence:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the "passional elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community.

Id. at 343 (Rehnquist, J., dissenting) (quoting O. Wendell Holmes, Collected Legal Papers 237 (1920)).

3. The right to trial by jury is essential to a fair trial.

Finally, the right to trial by jury in civil cases is a fundamental right, essential to a fair trial. The *Duncan* Court established that the right to trial by jury is a fundamental right and essential to fair trail. *Duncan*, 391 U.S. at 157-58. While *Duncan* incorporated the right to a trial by jury in a criminal proceeding, the Court's pronouncements

about the components of a trial by jury that make it valuable to the American system of justice are universal. The features of a trial by jury that promote fairness in a criminal proceeding are equally applicable in civil proceedings. A trial by jury serves the same function in both proceedings. The right to trial by jury is equally essential to a fair trial in civil cases. Accordingly, every criteria established by this Court to justify incorporating the Seventh Amendment to the states exists.

C. The appellate court's decision violates the Seventh Amendment's requirement that "[n]o fact tried by the jury, shall otherwise be reexamined in any Court of the United States."

Lawyers, as officers of the court and public citizens, have a responsibility for the quality of justice. TEX. DISCIPLINARY R. PROF'L CONDUCT Preamble ¶ 1. In fulfilling this responsibility, lawyers should demonstrate respect for the legal system and for those who service it. TEX. DISCIPLINARY R. PROF'L CONDUCT Preamble ¶ 4. When necessary to promote justice, however, a lawyer has a duty to challenge the rectitude of official action to uphold our legal system. *Id.* This case demands a challenge to its rectitude. The appellate court's decision is arbitrary, capricious and a glaring example of the judicial activism that is occurring in the Texas judiciary. The decision is such a departure from the principles of appellate review that the decision offends all traditional notions of fair play and substantial justice and deprives Sverdlin of due process.

The judiciary of our country was intentionally structured by the founding fathers to hinder the rendition of judgments in derogations of a jury's verdict. Under our system of justice, juries find facts. Here only the jury, as

the fact finder was entitled to "reject" any evidence it found not credible – not the appellate court. Substituting itself for the jury and with limited, erroneous analysis of the actual evidence in the record, the appellate court rejects the facts found by the jury and renders a take-nothing judgment. It is an incredible miscarriage of justice and is a case in point of certain appellate courts in Texas making legal shock waves with their unprecedented percentage of reversals and particularly the reversal and rendering of judgments contrary to the will of the jury. *See* Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 435 (2003). An appellate court may or may not be compelled to a certain result, but it has no discretion to not apply the appropriate appellate standards for reviewing the evidence before concluding it is legally insufficient without circumventing the right to a jury trial embodied by the Seventh Amendment and Texas Constitution.

The opinion itself demonstrates the appellate court's intent to change the result. Although the court of appeals labeled it numerous wrongful findings as "no-evidence," the entire opinion is a thinly disguised effort to change the result of a six-week jury trial (four weeks which were the taking of evidence) when the Seventh Amendment prohibits it. Though Sverdlin is loath to be critical of the appellate court's conduct, the opinion so totally fails to consider the actual evidence introduced at trial that the foregoing conclusion is inescapable.

Sverdlin understands that certain reexamination is permitted under the Seventh Amendment, such as in remittitur and judgments as a matter of law. *See Dimick v. Schiedt*, 293 U.S. 474, 485 (1935); FED. R. CIV. P. 59(a); FED. R. CIV. P. 50(a)(1). However, the bounds of reexamination

under the Seventh Amendment are plainly exceeded when an appellate court rejects the facts found by the jury and refuses to even recite or analyze the evidence the jury heard before judicially erasing the jury's verdict after the fact. In *Walker v. New Mexico & S. P. R. Co.*, this Court stated:

> [T]he Seventh Amendment's aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . . .

165 U.S. 593, 596 (1897).

The Magna Carta forced King John to give rights to juries, not appellate courts. *Peterson v. Reyna,* 908 S.W.2d 472, 478-79 (Tex. App. – San Antonio 1995), *writ granted, judgment modified on other grounds,* 920 S.W.2d 288 (Tex. 1996). This Court in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) held that an appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. *Id.* An appellate court's "review of a jury verdict as to the sufficiency of the evidence is exceedingly narrow because of the requirements of the right to a jury trial preserved by the Seventh Amendment to the United States Constitution." *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988); *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting) ("[e]ither the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function.).

As demonstrated by the opinion itself, the appellate court not only failed to follow the dictates of appellate review, but actually considered evidence contrary to the judgment, while failing to consider evidence supporting it. The appellate court's desire to change the result in this case is perhaps best exemplified by the fact that its opinion portrays AMPS as a failing company and the FCIS as unproven technology when in fact this lawsuit was actually brought by Respondents to maintain control of both the technology and the company (at trial, Petitioners were cross-plaintiffs). In order to change the result, the appellate court was forced to ignore the evidence from numerous witnesses, both lay and expert, and thousands of pages of documents about the value of the company and its patented science that actually supported the jury's verdict.

For example, the appellate court held that there was legally insufficient evidence to support AMPS's usury claim because there was no evidence of the value of the patent assignment. However, Solomon, a C.P.A. and C.V.A. who testified as an expert, unequivocally testified that the value of the patent assignment was $25.4 million. His opinion of value was based exclusively on evidence in the record including the patent assignment itself. There was no objection to this testimony and no controverting evidence was offered. Even though it is well-established that properly admitted damages evidence will support a jury award, the appellate court simply chose to "reject" Solomon's testimony without citing a legal basis for so doing. The appellate court does not have the expertise required to "reject" an expert's valuation. Moreover, the record was replete with other evidence from which the jury could have

determined the value of the patent assignment.[1] The appellate court's refusal to even acknowledge this other evidence underscores its desire to simply change the result.

In another glaring example of judicial activism, the appellate court also held that there was legally insufficient evidence to support the jury's award of damages against four defendants for breach of fiduciary duty which fell within the range of damage evidence offered by AMPS. To justify changing the result, the appellate court erroneously relied on comments made by counsel in a post-trial hearing that the court took out of context and more importantly, that the jury never heard. If the appellate court had actually reviewed the record, then it would have found evidence that the company's total damages were at least $26.9 million. The jury's assessment of $5 million against each of four defendants is well within that amount. It is a well-established rule in Texas that if damages can be estimated with reasonable certainty, then the amount is left to the trier of fact. *See Bildon Farms, Inc. v. Ward County Water Imp. Dist. No. 2*, 415 S.W.2d 890, 896-97 (Tex. 1967); *Guardian Trust Co. v. Brothers*, 59 S.W.2d 343, 346 (Tex. Civ. App. – Eastland 1933, writ ref'd).

[1] The jury could have determined the value of the patent assignment from (1) Hancock and Solomon's expert testimony regarding the value of the patent from sales in the marine market, (2) the licensing contract with Hatch & Kirk valued at $90 million in gross profits to AMPS, (3) expert testimony regarding the value of AMPS which included the value of the patent, and (4) Sverdlin's testimony and many documents providing evidence of historic sales and revenues (including gross profit margins) as well as projections of anticipated revenues agreed to by the Respondents and incorporated into the parties' written agreements.

The appellate court also held that there was no evidence of tortious interference despite overwhelming evidence that Sverdlin's termination was part of a concerted plan by Respondents to take control of Sverdlin's patents and company for their own benefit. Every finding made by the jury supports the inescapable conclusion that they believed that the Respondents' tortiously interfered with Sverdlin's employment agreement for their own self-interest. The appellate court completely fails to even recite any of this evidence before concluding there was "no evidence."

Finally, the appellate court found that there was no evidence to support the jury's damage award for fraud based upon the instruction submitted to the jury. Although the instruction was susceptible to different interpretations and there was no objection to the instruction, the appellate court read and applied the instruction in a manner that was completely contrary to the actual facts of the case. To change the result, the court violated two cardinal rules for determining the meaning of a jury verdict in Texas. First, the reviewing court must interpret the finding so as to reconcile it with the jury's verdict as a whole, if reasonably possible in light of the pleadings and evidence, and the manner of submission. *See Luna v. Southern Pac. Transp. Co.*, 724 S.W.2d 383, 384 (Tex. 1987). Second, the finding must be interpreted to uphold the judgment. *See Jackson v. United States Fidelity & Guar. Co.*, 689 S.W.2d 408, 412 (Tex. 1985). The only explanation for the court's violation of these rules is that it was determined to ignore the jury's verdict and change the result in this case.

The appellate court's clear failure to analyze or apply the law correctly is a clear violation of the Seventh Amendment and deprives Sverdlin of due process. Certainly, to

comply with the duty to preserve the right to trial by jury, appellate courts should be required to recite and analyze the evidence in the record supporting the jury's verdict before concluding after the fact that the evidence is actually "no evidence." The legal standards for appellate review of jury verdicts are not just technical requirements of appellate law, but mandated guardians of the constitutional right to a trial by jury under the Seventh Amendment. *See* U.S. CONST. AMEND. VII. This fundamental right is the cornerstone of our democracy and must be protected.

CONCLUSION

For the foregoing reason, Petitioners respectfully request that certiorari be granted.

Respectfully submitted,

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March 10, 2005

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APPENDIX A

121 S.W.3d 785

Court of Appeals of Texas,
Houston (1st Dist.).
Mark SWANK; Marvin Chudnoff;
Jeffrey Sussman; Louis Dreyfus Natural Gas Holdings;
L.D.E. Associates, L.L.C.; and James McCoy, Jr.,
Appellants/Appellees,
v.
Anatoly SVERDLIN, Individually and
Derivatively on Behalf of Automated
Marine Propulsion Systems, Inc.,
Appellees/Appellants.
No. 01-99-00428-CV.

Sept. 4, 2003.
Rehearing Overruled Nov. 7, 2003.

David J. Beck, Beck, Redden & Secrest, Jennifer Ho_an Greer, Kathy D. Patrick, Gibbs & Burns, L.L.P., Houston, David E. Keltner, Jose, Henry, Brantley & Keltner, Fort Worth, K. Chris Todd, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, DC, Jack O'Neill, Byron C. Keeling, Clements, O'Neil, Pierce & Nickens, Frank G. Jones, Fulbright & Jaworski, Larry R. Veselka, Smyser, Kaplan & Veselka, L.L.P., Houston, Brendan V. Sullivan, Jr., John J. Buckley, Jr., Paul Mogin, Williams & Connolly LLP, Washington, D.C., for Appellant.

Alice Oliver-Parrott, Maria Teresa Arguindegui, Burrow & Parrott, L.L.P., John L. Hill, Mallory Wade Turner, Locke Liddell & Sapp LLP, Kevin McEvily, McEvily & Flowers, Houston, James E. Essig, Webster, for Appellee.

Panel consists of Justices HEDGES, JENNINGS, and EVANS.*

OPINION

ADELE HEDGES, Justice.

In this commercial dispute, Mark Swank, Marvin Chudnoff, Jeffrey Sussman, Louis Dreyfus Natural Gas Holdings Corp., L.D.E. Associates, L.L.C., and James McCoy, Jr. appeal a judgment in favor of Anatoly Sverdlin individually and derivatively on behalf of Automated Marine Propulsion, Systems, Inc.[1] We reverse and render.

Background

Anatoly Sverdlin, an engineer, came to Houston in 1974, after defecting from the Soviet Union. In 1977, he started his own business, Automated Marine Propulsion Systems, Inc. ("AMPS"), which primarily repaired diesel marine engines on large ships. Sverdlin was the sole owner and chief executive officer ("CEO") of AMPS. Between 1992 and 1994, AMPS's net income was approximately $110,000. Thereafter, Sverdlin developed and secured a series of three patents for a new fluid control injection system ("FCIS"), which allegedly improved engine efficiency and lowered costs. Sverdlin obtained

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* The Honorable Frank Evans, former Chief Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

[1] The parties present numerous issues in their briefs, including new issues within other issues or in footnotes. Issues that are not appropriately before this Court for appellate review are waived. Tex.R.App. P. 38.1(e), (h), 38.2(a)(1).

certification from several international marine classification societies to enable owners of oceangoing vessels with FCIS to obtain insurance. FCIS was installed on numerous engines and underwent testing in Japan at the end of 1994. To further develop the FCIS, AMPS shifted its focus away from engine repairs, and in 1995, the company began to operate at a loss. AMPS lost over $125,000 in 1995. Sverdlin obtained a bank loan, but additional capital was required. A business plan was needed to attract investors.

In early 1995, James McCoy was hired as vice-president of industrial sales to promote FCIS. A few months later, Mark Swank was hired as president of AMPS to develop a business plan to attract investors. Swank and McCoy each received a salary and yearly stock options, the total of which was not to exceed 20% each.

Swank prepared a five-year financial projection of AMPS's potential net income, assuming FCIS was successful. The projections, based on a 1% market share, estimated that AMPS would receive approximately $120 million in revenue over five years, which would result in approximately $50 million in post-tax revenue for AMPS.[2] In late 1995, McCoy introduced Sverdlin to an investor, Marvin Chudnoff. Chudnoff was interested in investing in AMPS, and he recruited additional investors.

Chudnoff and three other individuals created AMPS Investment, L.L.C. Subsequently, AMPS Investment, L.L.C. created L.D.E. Associates, L.L.C. ("LDE"), through which AMPS Investment, L.L.C. and Louis Dreyfus

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[2] Plaintiffs' expert witnesses based the damage valuation of AMPS on these projections.

Natural Gas Holdings Corp. ("LDNGH") invested in AMPS. Jeffrey Sussman, one of AMPS Investment, L.L.C.'s members, signed documents as LDE's president.

Lengthy negotiations ensued over several months regarding a deal for AMPS to obtain a $2 million loan from LDE to continue development and marketing of FCIS. During the negotiations, Chudnoff often spoke on behalf of the investors, and Swank often spoke on behalf of AMPS.[3]

A letter agreement was signed on June 6, 1996 ("the June Letter Agreement"). Sverdlin testified that he did not read the June Letter Agreement when he signed it, and its terms were not what he was led to believe. However, both Sverdlin and his wife, the directors of AMPS at the time, signed a statement giving the AMPS board's approval to the June Letter Agreement.

The parties continued to negotiate the agreement through September. The investors conducted due diligence on AMPS and hired an engineering firm to evaluate AMPS and FCIS. The due diligence investigations revealed that a few terms in the September contracts varied slightly from those in the June Letter Agreement. The parties signed a series of related documents and finalized the transaction at the end of September 1996. Sverdlin chose not to read the documents prior to signing them because he had to catch an overseas flight.

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[3] The investors and AMPS were represented by counsel. Gardere, Wynne, Sewell & Riggs ("Gardere Wynne") represented AMPS. Sverdlin's wife, an attorney, also reviewed the documents. Swank hired Gardere, Wynne in March of 1996 to represent AMPS. The jury found that Gardere, Wynne represented both Sverdlin and AMPS.

Under the loan agreement, LDE had the right to choose two of the three directors at AMPS. Chudnoff and Sussman became such directors. Shortly thereafter, FCIS did not function as expected, AMPS lost money, and the parties began to disagree. Appellants testified that Sverdlin became hostile to employees and customers, blaming them for FCIS's problems. In mid-December, appellants asked Sverdlin to concentrate on engineering concerns and to not speak to customers. Sverdlin testified that the board of directors stopped listening to him, intervened in AMPS's business operations, and took control of the company, causing it to go into disarray and become unmanageable. The situation continued to escalate.

After several board meetings and discussions, the parties could not agree on how to run AMPS and could not work together. Sverdlin insisted the company would not survive without him. He threatened to fire Swank and McCoy and take back his patents.

Swank and McCoy exercised their stock options in AMPS. The AMPS board determined that Sverdlin's conduct was damaging the company in violation of his employment agreement. They terminated his employment with AMPS on January 16, 1997. The company had been operating at a loss. AMPS's net income after taxes in 1996 revealed over half a million dollars in losses. AMPS borrowed additional money directly from LDNGH.

After his termination, Sverdlin and the AMPS board continued to disagree. AMPS and LDE obtained a temporary restraining order, and, subsequently, a temporary injunction against Sverdlin enjoining him from: physically threatening AMPS's officers and employees; contacting

customers to disparage its business; entering the premises of AMPS and disrupting its activities; taking AMPS equipment/technology/customer lists; contacting marine classification societies in connection with AMPS; or terminating AMPS's directors and employees.

Sverdlin filed a counterclaim individually and on behalf of AMPS in his derivative capacity seeking declaratory relief and alleging numerous causes of action, including fraud, breach of contract, breach of fiduciary duty, negligence, gross negligence, conspiracy, tortious interference, and usury. Sverdlin asserted that he was never informed about certain aspects of the negotiations and did not understand the documents he had signed. Subsequently, the trial court modified the injunction to freeze all of the parties' contractual rights related to the June and September 1996 agreements and appointed a receiver to oversee AMPS's operations. Thus, the documents were frozen in escrow. The trial court also realigned the parties by making Sverdlin and AMPS the plaintiffs.

Sverdlin had sued Gardere Wynne and one of its attorneys, David Jungman, alleging malpractice based on conflicts of interest. Those claims were settled for a confidential amount. The jury awarded approximately $1.5 billion to Sverdlin and AMPS. Following several post-verdict hearings, the Honorable Judge Dwight Jefferson disregarded numerous findings, reduced the verdict to approximately $235 million in damages, and returned the patents and 100% of AMPS's stock to Sverdlin. After Judge Jefferson resigned, the case was transferred to the Honorable Judge Tracy Christopher. After several post-judgment hearings, Judge Christopher remitted a portion of the punitive damages, further reducing the judgment to approximately $180 million.

Standards of Review

Many of appellant's issues assert that the evidence is legally and factually insufficient to support many of the jury findings.

We follow the usual standards of review. In reviewing a legal sufficiency challenge, we consider all the evidence in the light most favorable to the verdict and indulge every reasonable inference deducible from the evidence in the prevailing party's favor. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997). In reviewing a factual sufficiency challenge, we consider all the evidence both supporting and contrary to the jury's finding. *Plas-Tex., Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex.1989).

Usury

The Jury Questions

The issues of usury liability and damages were set forth in jury questions 50 and 51 as follows:

QUESTION NO. 50

> Do you find by clear and convincing evidence that any of the following elements constitute a charge of interest to [AMPS] on September 20, 1996, for the $2 million loan?
>
> a) the patent assignment — YES
>
> b) the 30% option — YES
>
> c) the 50% option — YES

"Interest" is the compensation allowed by law for the use or forbearance or detention of money.

QUESTION NO. 51

What do you find to be the value of the items found by you to constitute interest in response to Question No. *50*? Answer in dollars and cents, if any, as to each of the following.

a)	the patent assignment	$ 26.4mm
b)	the 30% option	$ 330,000
c)	the 50% option	$ 550,000

AMPS contends that, in addition to the prime rate of interest as consideration for making a $2 million loan, LDE contracted for the patent assignment, the 30% option, and the 50% option – which the jury found to equal over $26 million in usurious interest. The jury found that the patent rights and stock options were compensation for the use of money. The trial court rendered judgment against LDE and LDNGH for usury, holding that AMPS (based on Sverdlin's derivative claims) was entitled to recover against LDE and LDNGH (by virtue of piercing the corporate veil) for about $74 million.

The Law

A usurious transaction is composed of three elements: (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex.1994). "Interest" means compensation for the use, forbearance, or detention of money. Tex. Fin.Code Ann. § 301.002(a)(4) (Vernon Supp.2003). "Usurious interest" is interest that exceeds the applicable maximum amount allowed by law. Tex. Fin.Code Ann. § 301.002(a)(17)

(Vernon Supp.2003). Usury statutes are penal in nature and should be strictly construed. *Tony's Tortilla*, 877 S.W.2d at 287.

Whether an amount of money is interest depends not on what the parties call it but on the substance of the transaction. *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex.1997). Not every obligation on a borrower in connection with a loan is interest. *Id.* For example, fees which are an additional charge supported by a distinctly separate and additional consideration, other than the simple lending of money, are not interest and thus do not violate the usury laws. *Id.*[4] Courts will look beyond the form of the transaction to its substance in determining the existence or non-existence of usury. *Gonzales County Sav. & Loan Ass'n. v. Freeman*, 534 S.W.2d 903, 906 (Tex.1976). A court will not hold a contract in violation of usury laws unless, upon reasonable interpretation of all terms, it is clear the intention of the parties was to charge more interest than allowed by the law. *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 341 (Tex.1980).

A fact question is raised when there is any dispute in the evidence as to whether a charge in addition to interest is actually for an additional consideration. *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex.1984). When there are no disputed facts, however,

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[4] Several Texas cases have recognized that certain charges are not considered interest. *See Tony's Tortilla*, 877 S.W.2d at 287 (bank's fee); *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex.1984) (attorney's fees); *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 489 (Tex.1979) (commitment fee); *Southland Life Ins. Co. v. Egan*, 126 Tex. 160, 86 S.W.2d 722, 724-25 (1935) (prepayment penalty).

courts have determined as a matter of law whether a charge is additional interest for the lending of money or for separate, additional consideration. *Id.* (holding that attorneys' service, consideration in addition to lending money, was not interest); *Tony's Tortilla*, 877 S.W.2d at 287-88 (holding as a matter of law that bank's fees were not interest).

The Facts

LDE loaned AMPS $2 million for 5 years, with interest accruing at an annual rate equal to the stated prime rate. Initially, Sverdlin pledged 30% of the AMPS stock to secure the loan. LDE acquired an option to purchase 30% of AMPS stock from Sverdlin, Swank, and McCoy pro rata. LDE acquired an option to purchase an additional 50% in AMPS.

Additionally, Sverdlin assigned his patents to LDE, which simultaneously licensed them to AMPS on a royalty-free basis. The investors initially wanted the patents assigned to AMPS to protect their loan to AMPS. Sverdlin voiced concern about a direct assignment to AMPS because a creditor of AMPS retained a prior first lien on AMPS's property. Sverdlin wanted to avoid any prospect of a lender asserting a lien on his patents. Accordingly, the patents were assigned to LDE with heavy encumbrances to protect Sverdlin's rights. For example, LDE could not use the patents. The Patent Assignment states, "Assignee [LDE] shall not use the Patent Rights itself or license or assign the Patents or any interest therein to anyone other than AMPS." The Patent Assignment also states that if AMPS ceases operation using the technology covered by the

patents, then assignee (AMPS) shall reassign such patent rights to assignor (Sverdlin).

- LDE→ loaned $2 million to → AMPS;
- LDE← received assignment of patent from ← Sverdlin; and
- LDE→ gave royalty-free license of patent to → AMPS.

AMPS's Theory to Support Usury

AMPS argues that LDE and LDNGH "required – as compensation for a $2 million loan to AMPS – that Sverdlin assign his FCIS patents to LDE, that Sverdlin grant LDE two options that would allow LDE to purchase 80% of AMPS's stock, and that AMPS pay interest on the loan at the prime rate." According to AMPS, LDE contracted for an assignment of the patents from Sverdlin with an immediate, exclusive, and royalty-free license to AMPS, thereby charging AMPS the value of the patents as interest, which resulted in usury.

Legal and Factual Sufficiency for Usury

Appellants LDNGH and LDE contend that the evidence is legally or factually insufficient to support the jury's findings regarding the value of the patent assignment.

$26.4 million reduced to $25.4 million

As noted above, the jury valued the patent assignment at $26.4 million; however, Sverdlin subsequently agreed to reduce this amount to $25.4 million. There is no evidence in the record to support the verdict of $26.4 million because Sverdlin's expert testified that the value of the

patent assignment was $25.4 million. Therefore, Sverdlin's motion for judgment reduced the value to $25.4 million. Sverdlin's counsel stated, "The testimony from the witness stand on behalf of the experts, both of them, was that the patents independently had a value of 25.4 million dollars. And that number is reflected in our motion for judgment. We have reduced the jury verdict to that to conform it to the specific evidence that came on as to the value of the patents." Accordingly, we examine whether the evidence was sufficient to support the $25.4 million valuation of the patent assignment.

Valuation of the Patent

Sverdlin presented two expert witnesses, Robert Hancock and Saul Solomon, both licensed CPA's. Hancock testified about the value of the patent and Solomon testified about the value of the patent assignment.

Hancock determined that the value of the patent was $25.4 million. He used a complicated financial process that was based on Swank's financial predictions.[5] Specifically, Hancock used the June Letter Agreement written by Swank, which contained a five-year projected income statement for 1996 through 2000. Hancock explained, "I looked at the five-year projections and ascertained that they were-AMPS was expected to earn a significant amount of money gradually building up over the five-year period to about $27 million per year." Swank's projected net income after taxes for these five years are as follows:

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[5] The financial predictions contained in AMPS's business plan were prepared as a marketing tool to solicit outside investors. They extended out for a five-year period.

	1996	1997	1998	1999	2000
Net income after taxes	($351,427)	627,237	4,003,866	10,115,776	27,716,202

Hancock assumed that in 2000, the projected net income would level off and would continue at a zero growth rate for the next five years.[6] He explained that "when we got to the year five, I presumed that they would level off at the level of sales and, thus, net income that they had achieved in year five and it would go out into perpetuity, forever." This assumption results in the following net incomes after taxes:

	2001	2002	2003	2004	2005
Net income after taxes	$27,716,202	27,716,202	27,716,202	27,716,202	27,716,202

Taking inflation into account, Hancock used a projected interest rate to discount each of the ten cash flows back to their present value, or their value in 1996 dollars. He added those ten present values and reached a net present value of $26,900,000, which he said represented

[6] This calculation is similar to a perpetuity calculation, holding the year 2000 net income figure as a constant income stream into infinity. At year 10, the cash flow is worth a relatively small amount after it is discounted back to present value.

the present value of AMPS's net income cash flows for ten years. Based on these calculations, Hancock opined that the value of AMPS's business in 1996 was $26,900,000.

However, the $26,900,000 amount included the value of the patents *and* AMPS's $1.5 million "topside repair business" that generated income from service and repairs. Therefore, Hancock subtracted $1.5 million to reach his final determination of $25,400,000 as the value of the patents.

	26,900,000	(Total present value of AMPS)
-	1,500,000	(Value of top side repair business)
=	25,400,000	(Value of patent)

Valuation of the Patent Assignment

Solomon testified that the value of the patent assignment was equal to the value of the patent. During cross-examination, AMPS's counsel questioned Solomon about the heavy encumbrances on the patent assignment. For example, LDE could not use the patent rights itself, nor could it license or assign the patents to anyone other than AMPS. Additionally, if AMPS ceased operation using the technology covered by the patents, then LDE was required to reassign the patent rights to Sverdlin.

Solomon opined that, despite such encumbrances, LDE received the full value of the patents because LDE was a controlling shareholder in AMPS. Solomon testified as follows:

> [AMPS's counsel]: It says [referring to Patent Assignment], "Assignee shall not use the patent rights itself or license or assign the patents or any interest therein to anyone other than

AMPS.". . . . Given that language, what value does LDE have as a result of assigning patents when they can't use it themselves, they can't license anybody but AMPS?

Solomon: Well, the value that they have is attributed to them through their control of AMPS. The fact that they control both the assignor and the assignment made between LDE Associates and AMPS which is the second part of this transaction. They control both – LDE Associates control both the licensing and the use of those patents. To give you an example, AMPS has the ability to license these patents to other companies. As long as AMPS is receiving a license fee of some amount, they have the ability to do that. AMPS could turn around and license these patents to another affiliate of Louis Dreyfus, any one of the companies, or anybody they so choose to and both sides of that transaction are controlled by the same people, the LDE Associates, Louis Dreyfus Natural Gas Corporation.

[AMPS's counsel]: Well, that hasn't happened, has it?

Solomon: [N]ot to my knowledge have they licensed the patents to a third party or to another Louis Dreyfus company.

[AMPS's counsel]: In fact, they licensed the patents back to AMPS, didn't they?

Solomon: Well, they did; but that did not preclude them from licensing it to another person. They controlled both sides –

[AMPS's counsel]: LDE can't license the patent to anyone else?

Solomon: No, LDE cannot but AMPS can – . . . .

[AMPS's counsel]: And AMPS could license to someone else and receive the money? . . . . And who owns AMPS?

Solomon: AMPS is owned primarily by LDE – I'm sorry, AMPS is owned – right now the contention, as a part of this lawsuit, is the stock is still in the name of Mr. Sverdlin.

[AMPS's counsel]: At the time this loan agreement was signed in September of '96, who owned the stocks in AMPS?

Solomon: Mr. Sverdlin owned the stock at that time.[7]

[AMPS's counsel]: 100 percent, correct?

Solomon: That's correct.

[AMPS's counsel]: So, who received the value if AMPS at that time were to license the patents?

Solomon: You're missing the point. AMPS could license those patents for a dollar to another Louis Dreyfus control company who would receive all the benefits, all of the economic benefits of those patent rights or they could assign it back – they can't assign it back to LDE according to the document. But there are other markets and other applications that they could also license to other third parties and receive the benefits of that.

[AMPS's counsel]: But that hadn't happened at that time, had it?

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[7] At the time of the patent assignment, Sverdlin was the owner of 100% of the stock; however, the option agreement granted a 30% option to LDE, and a 50% option to an affiliate of LDE.

Solomon: It had not happened at that time.

[AMPS's counsel]: Hadn't happened to date?

Solomon: Not that I'm aware of.

[AMPS's counsel]: But your testimony is that LDE got $25,400,000 of value at the time this loan agreement was closed?

Solomon: As the value of the patent rights that were assigned to them in this transaction, yes.

Solomon thus posited that the patents assignment had value to LDE "through their control of AMPS." Solomon explained that, although LDE could not sell the patents, LDE did control AMPS, and AMPS could "turn around and license these patents to another affiliate of Louis Dreyfus, any one of the companies, or anybody they so choose." Therefore, AMPS asserts, LDE received the full value of the patents because LDE was a controlling shareholder in AMPS.

We reject this view. If LDE requests this Court to disregard the corporate structure on the patent assignment, then we would also have to disregard the corporate structure as to the loan itself. In other words, if LDE fully controls AMPS with regard to the restrictions on the patent assignment, then LDE could disregard its $2 million loan to AMPS, and instead consider the $2 million as a capital investment. AMPS cannot have it both ways.

A usurious transaction is tested not by what the debtor parts with, but rather by what the creditor receives. *Stewart v. Briggs*, 190 S.W. 221, 222 (Tex.Civ.App.-Texarkana 1916, no writ). The value of the patent assignment is based on the value received by LDE, including the encumbrances. LDE did not have the right to sell or even

use such patents pursuant to the assignment; therefore, LDE did not benefit from the full value placed on the patents.

We hold that the value of the patents does not equate to the value of the patent assignment. Because the jury had no evidentiary basis on which to base its valuation of the patent assignment, we must disregard the finding. The value of the patent assignment is crucial to Sverdlin's usury claim. The $2 million loan, even with the prime interest rate and the values the jury found for the stock options, cannot be considered usurious without considering the patent assignment.

We reverse the judgment of the trial court with regard to usury and render judgment that AMPS take nothing on its usury claim.

Because AMPS cannot recover for usury, we do not reach the remaining arguments by LDE and LDNGH, which included: transfer by a third party, savings clause, contingency, uncertain or speculative value, and notice. We do not reach LDNGH's arguments that it cannot be liable for usury when it was not the lender and did not charge for, contract for, or receive usurious interest; nor can it be liable for usury under the veil-piercing theory. We also do not reach LDE's arguments challenging the legal and factual sufficiency of the evidence in support of the jury's actual damage award for usury and the application of the statutory cap to punitive damages for usury. Nor do we reach Sverdlin's cross-appeal challenging the trial court's calculation of the usury penalty.

Breach of Fiduciary Duty

The Jury Questions

The issues of breach of fiduciary duty and resulting damages were set forth in jury questions 16 and 17 as follows:

QUESTION NO. 16

> Did any of the following individuals breach a fiduciary duty to [AMPS]?
>
> Answer "yes" or "no" as to each of the following

		YES	NO
a)	Mark Swank	/	
b)	Jim McCoy	/	
c)	Jeffrey Sussman	/	
d)	Marvin Chudnoff	/	

You are instructed that an officer or director of a corporation owes a fiduciary duty to the corporation and the shareholders collectively. You are instructed that the fiduciary duty that is owed by an officer or director of a corporation includes the duty of loyalty, the duty of obedience, and the duty of due care.

Where a fiduciary relationship exists, the burden is on the fiduciary to show that he acted fairly and informed the beneficiary of all material facts relating to the challenged transaction.

QUESTION NO. 17

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate [AMPS] for its damages, if any, that were proximately caused by such breach of fiduciary duty?

Answer in dollars and cents, if any.

a)	Mark Swank	$ 5 mm
b)	Jim McCoy	$ 5 mm
c)	Jeffrey Sussman	$ 5 mm
d)	Marvin Chudnoff	$ 5 mm

AMPS's Theory to Support Breach of Fiduciary Duty

AMPS contends that Swank breached his fiduciary duty because he was an integral part of the "scheme to steal the FCIS technology, seize control of AMPS, run it at a loss, and profit at the company's expense." It argues that Chudnoff and Sussman breached their fiduciary duties because they "defrauded their way onto AMPS's Board, seized control of the company, created incentives to profit personally as the company's value fell, and proceeded to run it at a loss. As directors of AMPS, part owners of LDE, and individual owners of the 50% option, their interests were consistently in conflict."

Damages for Breach of Fiduciary Duty

The trial court disregarded the jury's answers with regard to McCoy and assessed damages against Swank, Sussman, and Chudnoff. First, we will address McCoy, then we will turn to the sufficiency of the evidence to support the damage award for the alleged breaches by Swank, Sussman, and Chudnoff.

McCoy

In a cross-point, AMPS contends that the trial court erred in disregarding the jury's finding that McCoy breached his fiduciary duty to AMPS. Specifically, AMPS appealed the court's disregard of the jury's finding to the liability question regarding breach of fiduciary duty by McCoy, as set forth above in Jury Question 16. AMPS did not raise as error on appeal the court's disregard of the damages question, Jury Question 17, which awarded AMPS $5 million for McCoy's breach of fiduciary duty. AMPS's brief on appeal does not challenge this damage question.[8] Accordingly, AMPS waived any error as to McCoy. Tex.R.App. P. 38.1.

Swank, Sussman, and Chudnoff

The judgment awarded AMPS damages for breach of fiduciary duty in the amount of $5 million each against Swank, Sussman, and Chudnoff, for a total of $15 million. Swank, Sussman, and Chudnoff contend that the evidence is insufficient to support the damage award.

AMPS responds that the $20 million total award (this figure includes the jury's $5 million award against McCoy, which was later set aside) was less than what the evidence established as the maximum amount of damages available for this injury. Specifically, AMPS explains that the jury could have found that AMPS was originally worth $26.9 million and lost everything. The $26.9 million value was derived from Hancock's testimony that AMPS was worth

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[8] In its reply brief on appeal, AMPS asks this Court for an opportunity to amend its brief under Tex.R.App. P. 38.9. We decline to do so.

$26.9 million in June 1996, based in part on projections. AMPS adds the $26.9 million damage model to AMPS's $3.1 million in losses between January 1997 and July 1998, to reach a total of $30 million. AMPS then divided the $30 million by the six defendants found to have harmed AMPS by breaching fiduciary duties. In other words, AMPS argues that the jury could have apportioned the total $30 million loss among the six defendants, for a total of $5 million each.

	$ 26,900,000	(Hancock's valuation of AMPS)
+	3,100,000	(losses between January 1997 & July 1998)
=	30,000,000	(AMP's total loss)
	$ 30,000,000	(AMP's total loss)
/	6	(number of defendants)
=	5,000,000	(jury award)

It is important to note that AMPS bases its calculation on the following six defendants: (1) Swank; (2) McCoy; (3) Sussman; (4) Chudnoff; (5) Gardere Wynne; and (6) David Jungman. Swank, McCoy, Sussman, and Chudnoff were listed in the jury question for breach of fiduciary duty damages. Gardere Wynne and Jungman were not. Sverdlin had sued Gardere Wynne and Jungman for malpractice. The jury awarded Sverdlin nearly $60 million in actual and exemplary damages on those claims, which were later settled for a confidential amount.

During the December 29, 1998 hearing on entry of judgment, AMPS's counsel, Mr. Cunningham, explained the calculations as follows:

> Now, the best I can do – and these lawyers are representing these individual parties will be much more articulate than I am in trying to say

what their objections are to the total of $20 million to be awarded to AMPS derivatively; but the substance of what they are saying is they can't figure out how they come up with $5 million; but I can figure it out judge.

And that is that this corporation, the evidence is clear, was worth at least $27 million . . . . the expert's testimony was $26.9 million . . . .

Now, what they say is well between $20 million and of course before the settlement with Gardere & Wynne, 10 million more, that will be $30 million. That will be more than 27 point – $26.9 million.

. . . [T]here is a million six that was lost in 1997 plus another million dollars through six months of 1998; and if they are losing five hundred thousand dollars a month and you give another five hundred thousand dollars which just coincidentally the receiver's papers that he just filed for the third quarter reflect almost exactly that, a loss of a million four hundred and ninety, ninety-three or ninety-four some odd thousand dollars for the year, if you take that million five and add it to a million six and add it to 26.9, if you add one point six that they lost in 1997, plus a million five through three quarters of 1998 when this jury was hearing this evidence, you get to three million one. If you add three million one to 26.9, guess what you get, $30 million dollars. Twenty plus the ten caused by Gardere & Wynne.

. . . [T]hey are going to say, "Well, wait a minute. How did they get to $5 million?"

Well, if you take 30, if you know that's what the company lost; and we know that because that was the minimum loss based on the testimony

> . . . . its clear to me that the jury just said we know they have lost at least $30 million. If we divide it by 6, that's the most rational way to do it.[9]

AMPS divided the *$30* million losses by *six* defendants. This calculation is flawed because the jury assessed a total of *$20* million in damages against *four* defendants. Specifically, in Question Number 17, the jury assessed $5 million each in breach of fiduciary duty damages against the following *four* defendants: Swank, McCoy, Sussman, and Chudnoff. The jury did not assess a damage award for breach of fiduciary against Gardere Wynne, Jungman, LDE, or LDNGH. In Question Number 21, the jury assessed $10 million, or $5 million each to Gardere Wynne and Jungman for negligence – not for breach of fiduciary duty. Nowhere in the charge did the jury assess an additional $10 million for breach of fiduciary duty to Gardere Wynne and Jungman. As set forth above during the hearing, Mr. Cunningham stated, "$20 million and of course before the settlement with Gardere & Wynne, 10 million more, that will be $30 million." We cannot consider

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[9] Later in the hearing, the trial court expressed its confusion as follows:

> [Cunningham]: The facts are that AMPS was worth $27 million at a minimum. And the jury went through and divided up the amount of damages. . . . Remember when we got to the picture of damages that caused the corporation to lose everything, and that's a fact. It's uncontested in this record. It's insolvent, and it is in three or four million dollars of debt. . . . [The jury] really apportioned [the damages] amongst the officers and directors in the total of twenty million; but by letting Mr. McCoy out, we lost that $5 million; but that doesn't mean that the corporation didn't sustain more than $5 million in damages.
>
> [The Court]: That kind of makes no sense, doesn't it?

the settlement amount and find no evidence of "$10 million more" by Gardere Wynne. Thus, we hold that there is no evidence in the record to support AMPS's calculation.

We recognize that the jury has discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for the jury's calculation. *Mayberry v. Texas Dept. of Agric.*, 948 S.W.2d 312, 317 (Tex.App.-Austin 1997, writ denied). Through Hancock, AMPS presented a specific damage model and posited a precise (albeit flawed) calculation based on $30 million divided by 6 defendants to reach $5 million each. Therefore, this case is distinguishable from other types of cases in which the jury was presented with a range of potentially appropriate awards. *See id.*

Instead, this case is more akin to *First State Bank v. Keilman*, in which both parties provided a "relatively precise method" for calculating unauthorized interest. 851 S.W.2d 914, 931 (Tex.App.-Austin 1993, writ denied). In *Keilman*, the jury's $360 award fell in between the plaintiff's $7,161.44 figure and the defendant's $0 figure. *Id.* Although the award was within the range, the court explained that "a jury may not 'pull figures out of a hat'; a rational basis for the jury's calculation must exist." *Id.* at 930 (quoting *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir.1990)). The court concluded that the jury's finding of $360 was inexplicable in light of the evidence presented at trial and that there was no rational basis for the calculation. *Id.* at 931. A jury may not "arbitrarily assess an amount neither authorized nor supported by the evidence presented at trial." *Id.* at 930. Because it appeared that the jury pulled its award "out of a hat," the court held that the evidence was insufficient. *Id.* at 931.

After a thorough review of the record, we conclude that there is no evidence in the record to support a finding that each of these defendants specifically caused $5 million in damages for their alleged breaches of fiduciary duty. We therefore hold that the evidence is legally insufficient to support the jury's $5 million awards each against Swank, Sussman, and Chudnoff for breach of fiduciary duty.

We reverse the judgment of the trial court with regard to the damage awards for breach of fiduciary duty. Because there is no evidence to support the damage awards for breach of fiduciary duty, we likewise reverse the judgment with regard to exemplary damages for breach of fiduciary duty and conspiracy to breach fiduciary duty. We render judgment that AMPS take nothing on its breach of fiduciary duty claims.

Tortious Interference

Appellants contend that the evidence is legally and factually insufficient to support the jury's finding that they tortiously interfered with Sverdlin's employment agreement with AMPS.

The Jury Question

The issue of tortious interference was set forth in jury question 42 as follows:

QUESTION NO. 42

> Did any of the following individuals or entities intentionally interfere with Anatoly Sverdlin's Employment Agreement with [AMPS] without legal justification?

Answer "yes" or "no" as to each of the following.

		YES	NO
a)	Mark Swank	/	
b)	Jim McCoy	/	
c)	Marvin Chudnoff	/	
d)	Jeffrey Sussman	/	
e)	LDNGH	/	
f)	LDE	/	

You are instructed that interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

You are further instructed that legal justification means a good faith belief that he/she/it had a right to interfere with the contract.

The Law

A party to a contract has a cause of action for tortious interference against any third person who wrongly induces another contracting party to breach the contract. *Holloway v. Skinner*, 898 S.W.2d 793, 794-95 (Tex.1995). The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) interference that proximately caused damage; and (4) actual damage or loss. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex.1998).

In most cases, the alleged tortfeasor is a stranger to the contract. *Holloway*, 898 S.W.2d at 795. However, the inducing and the breaching party may be one and the same. *Id.* When the alleged tortfeasor is also a corporate agent, the second element of this cause of action, the act of

interference, is of particular importance. To establish a prima facie case under such circumstances, the alleged act of interference must be performed in furtherance of the tortfeasor's own personal interests. *Id.* at 796. This requirement is necessary to preserve the general rule that a party cannot tortiously interfere with its own contract. *Id.* To meet this burden in a case of this nature, the plaintiff must show that the tortfeasor acted in a fashion so contrary to the corporation's best interests that his actions could have been motivated *only* by personal interests. *Id.* (emphasis added). A corporate agent's "mixed motives" to benefit himself as well as the corporation are insufficient to establish liability. *Id.* at 796 (citation omitted). When determining whether an agent acted against the corporation's interests, we consider the corporation's evaluation of the agent's actions. *Powell Indus., Inc.*, 985 S.W.2d at 457. "A corporation is a better judge of its own best interests than a jury or court." *Id.*

Waiver

Sverdlin contends that appellants waived this challenge by failing to object to the form of the question submitted. We disagree. An objection to the charge was not necessary here because we are reviewing the sufficiency of the evidence to support the finding based on the definition and instructions submitted to the jury in the charge as written. *See Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex.1985).

No Evidence of Tortious Interference

Appellants contend that *Powell Indus., Inc. v. Allen* is directly on point. 985 S.W.2d at 457. In *Powell*, the company's CEO asked Allen, another executive, to have the

company pay $3,000 for the CEO's personal accounting services. *Id.* at 456. Allen told the CEO that payment would be illegal. *Id.* Shortly thereafter, Allen was fired, and he sued the CEO for tortious interference with his employment contract. *Id.* The court held, "While [the CEO] may have benefitted by firing Allen, the mere existence of a personal stake in the outcome is insufficient to show that the defendant committed an act of willful or intentional interference." *Id.* at 457. Allen did not adduce evidence that the CEO acted "only in his own interest and against the company's interest"; therefore, the tortious interference claim failed.

Similarly, in this case, it is insufficient for Sverdlin to show that appellants committed an act of willful or intentional interference. There were reports that Sverdlin had become disruptive, abusive, and a negative force in the company. As in *Powell*, evidence of a corporate officer's mixed motives – to benefit both himself and the corporation – is insufficient to prove tortious interference. *Id.* Sverdlin did not adduce evidence that appellants acted only in their own interests and against AMPS's interests. The record shows that AMPS's board authorized Swank to fire Sverdlin. Given the board's approval of firing Sverdlin, and Swank's action in firing Sverdlin based on such approval, we cannot conclude that Swank, Chudnoff, Sussman, or McCoy acted in a manner so contrary to AMPS's interests that they could have been motivated only by their personal interests. Sverdlin argues that his termination was not in AMPS's best interests; however, even if true, this complaint is not conclusive evidence of tortious interference. *See id.* ("A principal's complaint about its agent's actions is not conclusive of whether the agent acted against the principal's best interests.")

Moreover, even after Sverdlin was fired, he did not have the authority to fire the board members, despite his threats to do so. Under the loan agreement, Sverdlin had agreed to vote all shares of AMPS to elect at least two individuals designated by the lender. Accordingly, appellants' job security could not have been a motivation to fire Sverdlin. Because appellants' stock options in AMPS were already granted to them, those rights would not have changed by firing Sverdlin. Finally, appellants had a financial interest in AMPS, including stock, stock options, and loans. Thus, they had financial reasons to act in the best interest of AMPS.

LDE Associates was represented by agents Sussman and Chudnoff who were on the board at AMPS and acted in a manner consistent with AMPS's interests and, therefore, cannot be liable for tortious interference. Likewise, LDNGH cannot be liable for tortious interference based on such agent's or LDE Associate's liability.

After reviewing the record in this case, we hold that there is no evidence to prove that appellants committed an act that was so contrary to the corporation's best interests that it could have been motivated only by the pursuit of personal interests. Therefore, we hold that there is no evidence of tortious interference. We reverse the judgment with regard to tortious interference and render judgment that Sverdlin take nothing on his tortious interference claim.

Accordingly, we need not address the affirmative defense of legal justification. Nor do we reach appellants' remaining argument that the punitive damages for tortious interference are in excess of the statutory limit.

Fraud Damages

We address whether there is evidence of damages for fraud against Sverdlin in connection with the transaction involving his patents.

The Jury Question

The issue of fraud damages was set forth in jury question 35 as follows:

QUESTION NO. 35

> What sum of money, if any, if paid now in cash would fairly and reasonably compensate Anatoly Sverdlin for his damages, if any, that were proximately caused by such fraud?
>
> Answer in dollars and cents, if any, as to each of the following.

a)	Mark Swank	$ 26.5mm
b)	Jim McCoy	$ 26.5mm
c)	Marvin Chudnoff	$ 26.5mm
d)	[LDNGH]	$ 26.5mm
e)	[LDE]	$ 26.5mm

Consider the following element of damages, if any, and none other:

> *The difference, if any, between the value of the patents as received and the value they would have had if they had been as represented.*

(Emphasis added.)

Waiver

Sverdlin contends that appellants waived this challenge by failing to object to the form of the question submitted. Again, we disagree. An objection to the charge was not necessary here because we are reviewing the sufficiency of the evidence to support the finding based on the definition and instructions submitted to the jury in the charge as written. *See Larson*, 690 S.W.2d at 568. We are not authorized to evaluate the sufficiency of the evidence under calculations different from those the jury were instructed to employ. *See id.*

No Evidence of Fraud Damages

There is no evidence to support an award of damages for fraud based on the measure of damages submitted to the jury. Sverdlin's fraud claim was not based on misrepresentations regarding the patents, and the patents were to be *conveyed* by Sverdlin, not *received* by him. Sverdlin did not purchase the patents, and the value of the patents was never misrepresented to him. Thus, there is no evidence of the value of the patents as received, the value of the patents as represented, or the difference, if any, between those values. The only evidence of the value of the patents was the value of the FCIS business, $25.4 million, which Hancock, Sverdlin's and AMPS's expert on damages, also identified as the value of the patents. There is no evidence to support a damage award for fraud under the theory submitted to the jury.

We reverse the judgment of the trial court for fraud damages in connection with Sverdlin's patents and render that Sverdlin take nothing on his fraud claim. Therefore, we do not reach the issue of fraud liability.

Negligent Misrepresentation

Sverdlin asserts a conditional cross-appeal asserting that the trial court erred in disregarding the jury's affirmative finding of negligent misrepresentation.

To prevail on a negligent misrepresentation claim, the plaintiff must demonstrate: (1) the representation was made by a defendant in the course of his business, or in a transaction in which he had a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *Federal Land Bank Ass'n. v. Sloane*, 825 S.W.2d 439, 442 (Tex.1991). To establish negligent misrepresentation, the plaintiff must also prove that the defendant misrepresented an "existing" fact in the course of the defendant's business rather than a promise of future conduct. *See Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex.App.-Houston [14th Dist.] 1998, pet. denied).

The alleged oral representations, which Sverdlin asserts constitute negligent misrepresentation, are promises of future conduct, and are not promises of existing fact. *See id.* (holding that alleged oral promise not to terminate Miksch was not a misrepresentation of an existing fact but was a promise to refrain from taking an action in the future). For example, the alleged oral promises not to fire Sverdlin, not to take control of AMPS, and not to exercise their stock options are promises of future conduct, not existing fact. As such, Sverdlin is not entitled to recover for negligent misrepresentation.

In determining whether Sverdlin met the justifiable reliance element, we must consider the nature of the relationship and the contract. Reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex.1999). Chudnoff, LDNGH, and LDE were adversaries of appellees in negotiating the June and September 1996 contracts. Thus, representations made by Chudnoff, LDNGH, and LDE during the contract negotiations do not justify reliance by Sverdlin and AMPS. Furthermore, in examining the contracts, the alleged misrepresentations by appellants are contrary to the terms of the contracts. To determine the terms of the contract, Sverdlin could have read the contracts. The fact that Sverdlin failed to read the contracts and simply chose to sign them does not amount to a ground of recovery for negligent misrepresentation.

We hold that the trial court did not err in disregarding the jury's finding of negligent misrepresentation.

Remaining Issues

The parties have also raised issues about disregarding the corporate fiction, reliability of expert testimony, multiple recovery, punitive damages (statutory cap and constitutionality), remittitur, settlement credit, attorneys' fees, perjury, and jury argument. Based on our disposition of the issues set forth above, we need not address the remaining issues and decline to do so.

Conclusion

For the above reasons, we reverse the judgment of the trial court and render judgment that Sverdlin and AMPS take nothing.

APPENDIX B

NO. 97-02103

ANATOLY SVERDLIN, Plaintiff, AUTOMATED MARINE PROPULSION SYSTEMS, INC., Derivative Plaintiff-Defendant, V. AUTOMATED MARINE PROPULSION SYSTEM, INC., L.D.E. ASSOCIATES, L.L.C., MARK SWANK, JAMES J. McCOY, JR., MARVIN CHUDNOFF, JEFFREY SUSSMAN and LOUIS DREYFUS NATURAL GAS HOLDINGS CORP., Defendants.	§ § § § § § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 215TH JUDICIAL DISTRICT

FINAL JUDGMENT

(Filed Jan. 25, 1999)

On September 22, 1998, came on to be heard the above-entitled and numbered cause wherein Anatoly Sverdlin, individually and derivatively on behalf of Automated Marine Propulsion Systems, Inc. ("AMPS"), Plaintiff herein after realignment of the parties, appeared in person and by attorney of record and announced ready for trial and Louis Dreyfus Natural Gas Holdings Corp., L.D.E. Associates, L.L.C., Mark Swank, James J. McCoy,

Jr., Jeffrey Sussman, Marvin Chudnoff, and AMPS, Defendants herein after realignment of the parties, appeared in person and by attorney of record and announced ready for trial. A jury having been previously demanded, a jury of twelve (12) qualified jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. The Charge of the Court and the verdict of the Jury are incorporated herein for all purposes by reference. The Charge submitted to the Jury contained fifty-seven (57) questions. The Jury rendered a verdict in favor of Anatoly Sverdlin, individually and derivatively on behalf of AMPS, on all issues. In connection therewith, the jury found in response to Question 52, that Louis Dreyfus Natural Gas Holdings Corp. is responsible for the conduct of L.D.E. Associates, L.L.C. After the submission of the case to the jury and the jury's verdict, but before the entry of judgment against Defendants herein, Sverdlin, individually and derivatively on behalf of AMPS, settled with Defendants Gardere Wynne Sewell & Riggs, L.L.P., and David Jungman. Based on that settlement, the Court on January 13, 1999 signed a take-nothing judgment disposing of all claims against Gardere Wynne Sewell & Riggs, L.L.P. and David Jungman. Because it appears to the Court that the verdict of the jury on all issues was for Anatoly Sverdlin, individually and derivatively on behalf of AMPS, the Plaintiff, and against Louis Dreyfus Natural Gas Holdings Corp., L.D.E. Associates, L.L.C., Mark Swank, James J. McCoy, Jr., Jeffrey Sussman, Marvin Chudnoff, and AMPS, the Defendants, judgment should be rendered on the verdict in favor of Plaintiff Sverdlin and against said Defendants, as set forth below.

TORTIOUS INTERFERENCE

1. IT IS THEREFORE ORDERED that Anatoly Sverdlin, in his individual capacity, is entitled to actual damages from L.D.E. Associates, L.L.C.; Mark Swank; Jeffrey Sussman; and Marvin Chudnoff, jointly and severally, for the tortious interference with Anatoly Sverdlin's employment agreement with AMPS.

2. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $500,200.00 in exemplary damages against L.D.E. Associates, L.L.C. as a result of its tortious interference with Anatoly Sverdlin's employment agreement with AMPS. Louis Dreyfus Natural Gas Holdings Corp. is jointly and severally liable with L.D.E. Associates, L.L.C. for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. L.D.E. Associates, L.L.C. and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

3. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $500,200.00 in exemplary damages against Mark Swank as a result of his tortious interference with Anatoly Sverdlin's employment agreement with AMPS. Mark Swank is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

4. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $500,200.00 in exemplary damages against Jeffrey Sussman as a result of his tortious interference with Anatoly Sverdlin's employment agreement with AMPS. Jeffrey Sussman is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

5. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $500,200.00 in exemplary damages against Marvin Chudnoff as a result of his tortious interference with Anatoly Sverdlin's employment agreement with AMPS. Marvin Chudnoff is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

FRAUD IN CONNECTION WITH SVERDLIN'S PATENTS

6. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover actual damages from L.D.E. Associates, L.L.C.; Mark Swank; and Marvin Chudnoff, jointly and severally, in the amount of $24,867,944.58 as a result of each of these parties' participation in the fraud in connection with Anatoly Sverdlin's patents. Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. Mark Swank; Marvin Chudnoff; L.D.E. Associates, L.L.C.; and Louis Dreyfus Natural Gas Holdings Corp. (as the result

of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

7. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover pre-judgment interest from L.D.E. Associates, L.L.C.; Mark Swank; and Marvin Chudnoff, jointly and severally, from April 23, 1997, until January 24, 1999, at the legal rite of ten (10%) per cent, simple interest, in the amount of $4,367,219.86 for the claim of fraud in connection with Anatoly Sverdlin's patents. Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this pre-judgment interest as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. Mark Swank; Marvin Chudnoff L.D.E. Associates, L.L.C.; and Louis Dreyfus Natural Gas Holdings Corp. (as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

8. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $50,800,000.00 in exemplary damages against L.D.E. Associates, L.L.C. as a result of its fraud in connection with Anatoly Sverdlin's patents. Louis Dreyfus Natural Gas Holdings Corp. is jointly and severally liable for this sum as a result of the jury's response to Question No. 52

finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. L.D.E. Associates, L.L.C. and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

9. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $50,800,000.00 in exemplary damages against Mark Swank as a result of his fraud in connection with Anatoly Sverdlin's patents. Mark Swank is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

10. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, have and recover $50,800,000.00 in exemplary damages against Marvin Chudnoff as a result of his fraud in connection with Anatoly Sverdlin's patents. Marvin Chudnoff is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

USURY

11. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover from Louis Dreyfus Natural Gas Holdings Corp., individually and as the party found to be responsible for the conduct of L.D.E. Associates, L.L.C. by the jury in

response to Question No. 52; and from L.D.E. Associates, L.L.C., jointly and severally, the amount of $72,840,000.00 said amount being the statutory penalty for the amount of usurious interest contracted for, charged, or received as a result of the usurious loan transaction with AMPS. Louis Dreyfus Natural Gas Holdings Corp. and L.D.E. Associates, L.L.C. are also jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

12. IT IS FURTHER ORDERED that the principal amount of the loan to AMPS reflected in the Loan Agreement dated as of September 20, 1996, of $2,000,000.00, plus any and all interest, paid or unpaid, on said loan, is forfeited as a statutory penalty as a result of the usurious interest contracted for, charged or received being in excess of double the amount of interest allowed by law.

13. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover from Louis Dreyfus Natural Gas Holdings Corp. and from L.D.E. Associates, L.L.C., jointly and severally, statutory attorneys' fees fixed by the Court in the amount of $1,000,000.00 as a result of their entering into a usurious loan transaction with AMPS. L.D.E. Associates, L.L.C. and Louis Dreyfus Natural Gas Holdings Corp. are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

14. IT IS FURTHER ORDERED that this award of attorneys' fees is part of the judgment here rendered.

BREACH OF FIDUCIARY DUTY TO AMPS

15. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover actual damages from Mark Swank in the amount of $5,000,000.00 as a result of Mark Swank's breach of fiduciary duty to AMPS. L.D.E. Associates, L.L.C. and Marvin Chudnoff are jointly and severally liable for this sum as a result of their conspiracy to breach a fiduciary duty to AMPS. Furthermore, Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. Mark Swank; L.D.E. Associates, L.L.C.; Marvin Chudnoff; and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

16. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover pre-judgment interest from Mark Swank from April 23, 1997, until January 24, 1999, at the legal rate of ten (10%) per cent, simple interest, in the amount of $878,082, for the actual damages on the claim against Mark Swank for breach of fiduciary duty to AMPS. L.D.E. Associates, L.L.C. and Marvin Chudnoff are jointly and severally liable for this sum as a result of their conspiracy to breach a fiduciary duty to AMPS. Furthermore, Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's

response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. Mark Swank; L.D.E. Associates, L.L.C.; Marvin Chudnoff; and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

17. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover $10,000,000.00 in exemplary damages against Mark Swank as a result of Mark Swank's breach of fiduciary duty to AMPS. Mark Swank is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

18. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS is entitled to actual damages from Jeffrey Sussman as a result of Jeffrey Sussman's breach of fiduciary duty to AMPS. L.D.E. Associates, L.L.C.; Mark Swank; and Marvin Chudnoff are jointly and severally liable for these damages as a result of their conspiracy to breach a fiduciary duty to AMPS. Furthermore, Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for these damages as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.

19. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and

recover $10,000,000.00 in exemplary damages against Jeffrey Sussman as a result of Jeffrey Sussman's breach of fiduciary duty to AMPS. Jeffrey Sussman is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

20. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover actual damages from Marvin Chudnoff in the amount of $5,000,000.00 as a result of Marvin Chudnoffs breach of fiduciary duty to AMPS. L.D.E. Associates, L.L.C. and Mark Swank are jointly and severally liable for this sum as a result of their conspiracy to breach a fiduciary duty to AMPS. Furthermore, Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C. Mark Swank; L.D.E. Associates, L.L.C.; Marvin Chudnoff; and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

21. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover pre-judgment interest from Marvin Chudnoff from April 23, 1997, until January 24, 1999, at the legal rate of ten (10%) per cent, simple interest, in the amount of $878,082.00, for the claim for Marvin Chudnoffs breach of fiduciary duty to AMPS. L.D.E. Associates, L.L.C. and

Mark Swank are jointly and severally liable for this sum as a result of their conspiracy to breach a fiduciary duty to AMPS. Furthermore, Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.; Mark Swank; L.D.E. Associates, L.L.C.; Marvin Chudnoff; and Louis Dreyfus Natural Gas Holdings Corp. (as the result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.) are jointly and severally liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

22. IT IS FURTHER ORDERED that based upon Anatoly Sverdlin's derivative claims, AMPS have and recover $10,000,000.00 in exemplary damages against Marvin Chudnoff as a result of Marvin Chudnoff's breach of fiduciary duty to AMPS. Marvin Chudnoff is liable for post-judgment interest on this sum at the rate of ten percent (10%) compounded annually from the date of Judgment until paid.

DECLARATORY JUDGMENT

23. IT IS FURTHER ORDERED that after considering the evidence and arguments of counsel, the Court determines and declares that Anatoly Sverdlin is entitled to a declaratory judgment pursuant to Section 37 of the Uniform Declaratory Judgment Act that Anatoly Sverdlin owns one-hundred (100%) per cent of the stock of Automated Marine Propulsion Systems, Inc. unencumbered by

any contractual rights of Defendants in connection with the September 1996 transactions.

24. IT IS FURTHER ORDERED that Anatoly Sverdlin, in his individual capacity, as a result of his declaratory judgment action, is entitled to recover from L.D.E. Associates, L.L.C.; Mark Swank; and James J. McCoy, Jr., jointly and severally, attorneys' fees for preparation and trial of this cause. Louis Dreyfus Natural Gas Holdings Corp. is also jointly and severally liable for this sum as a result of the jury's response to Question No. 52 finding Louis Dreyfus Natural Gas Holdings Corp. responsible for the conduct of L.D.E. Associates, L.L.C.

25. IT IS FURTHER ORDERED that this award of attorneys' fees is part of the judgment here rendered.

SETTLEMENT CREDIT

26. Based on the settlement by Defendants Gardere Wynne Sewell & Riggs, L.L.P., and David Jungman, Defendants Louis Dreyfus Natural Gas Holdings Corp., L.D.E. Associates, L.L.C., Mark Swank, James J. McCoy, Jr., Jeffrey Sussman, and Marvin Chudnoff are entitled to a credit against the judgment. As a result of the application of this credit, no damages have been awarded in paragraphs numbers 1, 18, and 24, and the damages in paragraph number 6 have been reduced. The calculation and application of this credit are reflected in the Court's sealed Order of January 25, 1999.

MISCELLANEOUS

27. IT IS FURTHER ORDERED that all costs of Court of the suit incurred against or by Louis Dreyfus

Natural Gas Holdings Corp.; L.D.E. Associates, L.L.C.; Mark Swank; Jeffrey Sussman; Marvin Chudnoff; and James J. McCoy, Jr. are taxed jointly and severally against these Defendants in favor of Anatoly Sverdlin, individually and derivatively on behalf of Automated Marine Propulsion Systems, Inc.

28. IT IS FURTHER ORDERED that the Receiver's fees and expenses shall not be taxed against or recovered from Automated Marine Propulsion Systems, Inc. or Anatoly Sverdlin.

29. IT IS FURTHER ORDERED that the injunction issued by the Court on January 24, 1997 (as modified on March 24, 1997 and January 7, 1998) is vacated.

30. IT IS FURTHER ORDERED that L.D.E. Associates, L.L.C., Automated Marine Propulsion Systems, Inc., Mark Swank, and James J. McCoy, Jr. take nothing on their claims/counterclaims against Anatoly Sverdlin.

31. IT IS FURTHER ORDERED that the Receiver is discharged as of the date of the signing of this Judgment.

32. IT IS FURTHER ORDERED that all writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary.

33. ALL OTHER RELIEF NOT EXPRESSLY GRANTED HEREIN IS DENIED.

SIGNED on this the 25 day of January, 1999.

/s/ Dwight Jefferson
JUDGE PRESIDING

APPENDIX C

Court of Appeals **[SEAL]**
First District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

[Names Omitted In Printing]

November 7, 2003

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RE: Court of Appeals Number: 01-99-00428-CV

Trial Court Case Number: 9702103

Style: Mark Swank, Marvin Chudnoff, Jeffrey Sussman and Louis Dreyfus Natural Gas Holdings, L.D.E. Associates, L.L.C., James McCoy, Jr.

v.

Sverdlin, Anatoly

The Court today, **DENIED** Appellee, Anatoly Sverdlin's motion for rehearing and motion for rehearing en banc.

Respectfully yours,
Margie Thompson, Clerk

Michelle Meuhlen

Michelle Meuhlen, Deputy Clerk

APPENDIX D

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

October 15, 2004

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RE: Case Number: 03-1159
Court of Appeals Number: 01-99-00428-CV
Trial Court Number: 97-02103

Style: ANATOLY SVERDLIN, INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF AUTOMATED MARINE PROPULSION SYSTEMS, INC.
v.

MARK SWANK, MARVIN CHUDNOFF, JEFFREY SUSSMAN, LOUIS DREYFUS NATIONAL GAS HOLDINGS CORP., L.D.E. ASSOCIATES, L.L.C., AND JAMES MCCOY, JR.

Dear Counsel:

Today the Supreme Court of Texas denied both petitions for review in the above-referenced case. (Justice O'Neill not sitting)

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Margie Thompson

APPENDIX E

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

December 10, 2004

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Ms. Jennifer Horan Greer
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1100 Louisiana, Suite 5300
Houston, TX 77002

RE: Case Number: 03-1159
Court of Appeals Number: 01-99-00428-CV
Trial Court Number: 97-02103

Style: ANATOLY SVERDLIN, INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF AUTOMATED MARINE PROPULSION SYSTEMS, INC.

v.

MARK SWANK, MARVIN CHUDNOFF, JEFFREY SUSSMAN, LOUIS DREYFUS NATIONAL GAS HOLDINGS CORP., L.D.E. ASSOCIATES, L.L.C., AND JAMES MCCOY, JR.

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice O'Neill not sitting)

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Margie Thompson
Mr. Charles Bacarisse